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THE
AMERICAN LAW REGISTER.

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RAILWAY MANAGEMENT AND RESPONSIBILITY.

I. THERE is one question which courts of justice, and railway managers, sometimes adjust in opposite directions ; we mean the source from which dividends should arise. The courts of justice have settled it, as an inflexible rule, that no joint stock company can justly declare dividends except out of the net earnings of the company. And it would seem there could be no question in regard to the soundness of that rule. But it is well known, that a considerable proportion of the American railway companies have attempted to maintain the credit of their stock, by the payment of dividends out of borrowed funds. And this experiment has been tried, to a considerable extent, in England and Scotland, within the last few years ; thereby creating great clamor, and no small confusion, both in the public opinion and the state of their own accounts.

Parliament has attempted to devise schemes for railway management, inspection and supervision, whereby an adequate remedy should be applied, by the action of the shareholders themselves, through the ordinary channels of corporate action. And there can be no question that this remedy is far more natural, and less liable to bring unjust discredit upon the market value of joint stock shares, than an appeal to the courts. The very fact that the concerns of a company have become the subject of judicial

controversy tends, more or less, to depreciate the value of its shares. The inference is very natural that there must have been some degree of mismanagement, or the matter would not have been brought before the courts. Men, who desire a safe investment of their money, naturally avoid the stock of a company in regard to whose management there exists a legal controversy.

But nevertheless these things must sometimes occur. It cannot be denied for a moment, that the payment of dividends on shares by a joint stock company, by means of borrowed funds, is a clear and unquestionable abuse. It is, in fact, neither more nor less than the diversion of so much of the capital stock. All funds borrowed by such companies, are the cashing of its capital, and after the distribution of it among the shareholders, the capital is so much diminished; and if the process is sufficiently extended, the capital must of course become entirely dissipated, and the company become a mere shadow and a sham. And so soon as the process begins, the shamming, to that extent, is initiated; and it is only in degree, or proportion, whether, after one-tenth, or one-half, or the whole, of the capital stock is thus dissipated, that the company becomes, more or less, a sham and a pretence. The law can only regard that as radically and essentially vicious and inadmissible, which, carried to its final results, will annihilate the substantial corporate existence of the company, and leave it a mere shadow, with all its organs of action, and without any of its substantial means of meeting its undertakings, and enabling it, so far as it puts forth any action, to have a name to live, while, to all practical purposes, it has really thereby become dead, and well deserves the final office of sepulture, which it becomes the duty of courts to perform.

The above view is so simple and so unquestionable, that it is scarcely possible to make it more intelligible by any illustration. It may be inquired of those who make, or who attempt to justify, this species of fictitious dividends, what is the proper definition of the real purpose and intent of a dividend upon shares in the capital stock of joint stock companies? Do we thereby understand a mere payment of money by the treasurer of the company to the shareholders, in proportion to the number of shares held by each, as an indemnity for accruing interest, thus treating the purchase of shares as a substantial loan, or advance, of so much money to the company? certainly not. For this would be to set

those companies in operation upon credit merely, when in fact there existed no basis for any credit or undertaking whatever. It may be too true, and not the less scandalous than true, that too many joint stock companies are allowed to go into operation upon no more substantial basis than this. But the true theory of joint stock companies is undoubtedly something very different from this. The money paid for shares is paid unconditionally to the company, and becomes the exclusive property of the corporation, and for ever represents the shares for which it is paid, not as a fund at interest, but a fund for the purpose of transacting the legitimate business of the company, and for which the holder of the share can have no claim of surrender or return, until the company, in the regular discharge of its appropriate office, or functions, earns more money than is required in carrying forward its lawful business. Then only is there any surplus which can lawfully be divided among the shareholders, so as to constitute a dividend. And to call anything else a dividend is a mere abuse of language. And for the courts, when applied to for the purpose, to allow any other mode of creating dividends, is an idea which no sound lawyer, or honest judge, could entertain under any circumstances. It is not a proposition admitting of any question or doubt, or of being made clearer by argument.

The question arose before Vice-Chancellor, now Lord Justice, WOOD, in the recent case of *Bloxam v. The Metropolitan Railway Co.*, and the decision was most unequivocal, in favor of the denial of all colorable dividends, even in anticipation of suspended earnings, and which it was confidently believed must be realized in a very brief period. The English courts have been resolute upon this point, as the only possible mode of enforcing honest management and proper accountability, both to the shareholders and the public. Unless this distinction between the distribution of net earnings among the shareholders, and the surrender of the capital stock, or a portion of it, to them, is strictly maintained, there is no security for any one having any connection with the company. The shareholders will never be able to know their value, and the general public, who may be inquiring for safe investment, will be equally in the dark. And so long as the capital stock of these companies is looked to as a means of investing funds, this rigid mode of management is indispensable, and it is quite impossible to even argue the contrary. And no

right-minded man can entertain any feelings of revolt, or reluctance, against the strict enforcement of this doctrine of the courts. It is only in the view of creating mere fancy or speculative stock, that the opposite doctrine could gain any countenance whatever ; and one would not expect such practice to receive much encouragement, either from the courts, or from prudent men of any class.

Yet there has been considerable clamor in Great Britain, from sources entitled to more or less consideration, in regard to the disastrous effects of the decisions of the courts upon this subject. But we cannot comprehend why there is any ground of complaint, or blame, in regard to the course pursued by the courts. The misfortune seems to have been, that the railway companies should have persisted in declaring dividends, to the same extent, in times of small returns, as when the earnings had been much larger ; or that they should have felt such reluctance in foregoing the regular semi-annual dividend, in any emergency, where larger outlays were demanded, thereby absorbing the entire earnings of the company for six or twelve months in succession. The indiscretion and misconduct seem to have lain altogether at the door of the managers of the companies, in so conducting their affairs as to admit of fair excuse for bringing the matter before the courts. We know it is not always possible to escape captious appeals to the courts ; but such appeals are not commonly damaging to the party attacked. It is only when the proceeding proves to be well founded, that any serious consequences, in depreciating stock, are likely to occur. It has certainly proved so in England. The London, Chatham and Dover Company has only suffered to the extent of its mismanagement out of court, and in no sense in proportion to the amount or character of its legal controversies. And the same is true of the Caledonian Railway Company in Scotland, and the London Metropolitan Company. And although it must be admitted there has arisen, in Great Britain, considerable distrust in regard to railway stocks, and that this has occurred contemporaneously with an unusual amount of railway litigation, it is not by any means apparent, that the disposition of the courts of equity to hold them up to the most rigid accountability and strict legal conduct of the affairs of the several companies, brought in question, has had any tendency to increase that distrust. We are quite confident, on the contrary, that the firmness of the

courts has had a large influence in allaying such distrust, when it was unreasonably excited, and in preventing its occurrence where we might otherwise have expected it to arise. It is safe to affirm that this will always be so in a well-informed and well-ordered state of public sentiment, and that the clamor against the resolute interference of the courts does not ordinarily arise from those parties who are content with the fair conduct of corporate interests, and equal justice to all. We may be permitted to suggest here, that there may have been already too many railways built, either for profit or convenience; since, if a section of country once obtains that convenience, it is far more helpless after being deprived of it than it would have been if it had always remained without one. And railways, or any other class of public works, which will not prove, and cannot be made, reasonably remunerative, will of necessity fall into decay, and ultimately into disuse. The only proper test of the necessity and permanent utility of railways must, like every other burden upon the property of a country or nation, be determined by the inquiry whether the traffic is sufficient to pay the running expenses, and a living compensation for the investment, unless that question can be affirmatively answered, it will be in vain to attempt to force the matter.

It may prove a gratifying speculation to many sections of country, to build, or attempt to build and maintain, railways upon mere credit, or voluntary subscriptions; and the thing is often done with the hope of thereby bringing out the undeveloped resources of the region, or those hoped to be found there. And there may have been some rare cases where such rash experiments have proved successful, but the general rule must always be in the opposite direction. There may be some men, under the infliction of oppressive taxation, who would rejoice to have any possible mode of escape opened to them. And in their desperation there may be some statesmen, or men in positions where, by courtesy, we should feel bound to expect statesmanship and far-seeing wisdom, who will be so rash as to expect to maintain the national credit abroad, by reducing the taxation below the point of meeting the current expenses of the government and the interest on the public debt, and who are simple enough to believe that it will make no difference how the money to meet the deficiency is raised, provided only that the interest on the public debt is

promptly paid. But experienced and prudent statesmen know well enough that it will be quite impracticable to maintain the public credit abroad, or at home even, in any other possible mode than by actually meeting the current expenses of the government, including the interest on the public debt, by the annual income of the government. It will be in vain to prove the immense resources of the country, and the ultimate certainty of the payment of every cent of public debt and interest. Nobody cares for such speculations, so long as he sees, before his own eyes, the clearest possible evidence of incapacity, or, what is the same thing, unwillingness to meet the present demands of the public expenditures. And the same is true of all associated or corporate debt. If the remunerative return for the capital invested is not raised from current earnings, it is the same as if it were not raised at all; and the creditors or holders of the stock will find poor consolation for the failure to meet the obligation now resting upon the debtor, that he is assuming still further obligations of the same character; thus compelling the necessity of falling deeper and deeper into the gulf from which there is no possible escape but by liquidation from present resources.

It is therefore useless and hopeless for any country to attempt to construct railways, where the expected traffic will not prove remunerative for all current expenses and invested capital. And the developments in regard to railway investments in Great Britain, show conclusively, that branch roads, which have now become very numerous on the main lines, and many very extended lines, in regions affording small traffic, either in freight or passengers, are only a dead weight upon the main lines, which would otherwise prove remunerative.

What we have here intimated in regard to the indispensable necessity of keeping railway management within the strictest legal boundaries, has been largely suggested, and constantly confirmed, by all that we have been able to see or learn of railway management in Europe. In England, and to some extent in the other departments of the United Kingdom, there has arisen, within the last two years, very great distrust in regard to the ultimate soundness and value of railway shares, chiefly in consequence of discovering a disposition in many of the more extended lines greatly to enlarge their capital stock, which was constantly indicated by the repeated applications to Parliament for enlarged

powers of that kind, more or less disguised by combining others therewith.

This naturally led to inquiry and investigation, and that called forth the standing excuse, that branch roads and extended lines, and their equipment and operation, made this large increase of capital indispensable. But upon more careful scrutiny, and critical inspection of the management of some of the lines, it was discovered that this immense extension of the connecting lines, which has converted all England into a continuous iron network, had not generally been attended with a proportionate increase of remunerative traffic. And it seems now pretty generally conceded there, that the extension of railway facilities in England has been quite overdone, and has really driven the directors into the adoption of expedients to meet their regular dividends, which were altogether indefensible, but which it is not easy to check, unless through the intervention of the courts; and that this, although a severe remedy, is far better, for all interests concerned, than quiet acquiescence in a system of management which is illegal, and in the end surely destructive.

II. There is a movement in Parliament, at the present time, for the government to purchase all the telegraphic lines in the United Kingdom, and connect that entire interest with the General Post-Office. This will prove most unquestionably a movement in the right direction, so far as business interests are concerned; and we see no reason to question the perfect propriety and practicability of bringing telegraphic correspondence under the same national supervision and control with the ordinary postal correspondence. And either, or both, may be so conducted, if that is specially desired, as to prove very nearly, if not entirely remunerative. We do not expect to see the same thing done, in form, in our own country, at present certainly. It will be many years, possibly, before the interests of contending factions will become so far combined, or so entirely identical with the public interest, as to enable the national government coolly and deliberately to consider questions of such grave and vital consequence, with that exemption from all partisan bias, which would be requisite in order to reach a conclusion likely to prove permanently satisfactory to all, and wisely consistent with the highest good of the vast commercial and governmental interests of the country. But we should hope that the period is not to be indefinitely deferred,

when our National Congress shall contain such a proportion of men of sufficient scope and comprehension as to enable the whole body to perceive that the telegraphic correspondence of such a vast empire is clearly of national concern, and one that imperiously demands the supervision and control of national legislation and of the national judiciary. This is the only possible mode in which the system can be made really efficient in accomplishing its greatest good for all parties and interests, and at the same time upon just and reasonable terms.

And it may not be out of place here to suggest that the practice of the Continental States in Europe affords a very satisfactory argument in favor of regarding both the railway and the telegraphic interests as exclusively of national concern. Thus, in Austria and many of the German States, and to some extent in Prussia, and exclusively in Russia, both these interests are essentially carried forward at the national expense, and through the action of official agencies; and in France the railways will all revert to the government in a brief period. And the telegraphic facilities are afforded throughout the Continental States, on terms more reasonable as to compensation, and in other respects far more satisfactory, than either in England or the United States.

We have so often discussed the question of the national supervision of our railway interest, that we feel reluctance to pursue it further on the present occasion. But no one can examine and patiently consider the vast and increasing extent and controlling influence of that interest, in all the states and dependencies of Europe, and not feel surprise, that while Congress is rushing with such ardent zeal into matters not only not expressly delegated by the United States Constitution, but, in the opinion of many, expressly, or constructively, prohibited by that instrument, it should not find time or inclination to give attention to the supervision and control of the railway and telegraphic interests of the country, which are so intimately and vitally interwoven with all national interests and independent action as to leave no ground to question either its importance or national character.

III. But there is one other subject connected with railway management and responsibility to which we desire to devote some consideration here. We refer to the exact limits of responsibility, and the precise measure of care and diligence which the law imposes upon, or requires of, passenger carriers by railway. We

have been so long accustomed to define this diligence and responsibility by reference to, and comparison with, that of common carriers of goods, and to consider the former as of an inferior degree, as compared with the latter, that it seems to us the profession are not fully sensible of the real extent of the responsibility which the law imposes upon railway passenger carriers. The more we have studied and attempted to define this distinction between the degree of responsibility imposed upon railway passenger carriers and common carriers of goods, the more clearly we have felt that the difference is rather formal than substantial. The cases all agree, that passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and that if injury occurs by reason of the slightest omission in regard to the highest perfection of all the appliances of transportation, or the mode of management at the time the damage occurs, the carrier is responsible, as well in the case of passengers as of goods. In the latter case it is said that the carrier is absolutely bound to safe delivery, and not in the former. But in the case of goods, the carrier is excused for loss or damage occurring from the misconduct of the owner, either in package or storage, or stowage in regard to any other thing when he assumes to act, or direct, on his own responsibility. And he is not responsible for damage occurring from inevitable accident or irresistible force, or, as it was formerly said, for those results which follow from the act of God or the King's enemies.

And when we admit all these excuses for passenger carriers, there remains very little, or nothing more, which the law recognises as an adequate excuse for any damage occurring during the transportation. We are accustomed to suppose that damage occurring from the want of more perfect appliances for passenger transportation, is not chargeable to the carrier; and we are not aware that this precise point has been decided. It is, indeed, not always easy to determine precisely the effect of any particular defect existing in the appliances in actual use upon any particular line of railway where damage occurs, and what might have been the exact result if the appliances had been as perfect as possible. And so, too, of the management of the particular train, at the time the injury occurred, it is not always a point upon which skilled and experienced men agree, what might have been done more or different from what was done to insure safety. And there

are many that suppose the passenger assumes all the risks resulting from such deficiencies as are apparent to all, and therefore presumably known to him. As for instance, when it can be shown, with reasonable certainty, that if there had been a double track no damage could have occurred at the time, or in the mode, in which it did, the opinion is not uncommon, we believe, that this will not fix the responsibility of the carrier ; but we consider this opinion to be altogether erroneous. For if this view can be entertained, and carried to its logical results, it will go a long way towards excusing passenger carriers for all damage which is not the result of some degree of negligence at the very time it occurs.

For if railway companies may excuse themselves from responsibility for damage to passengers, by proving the most obvious and criminal defects in the construction and equipment of their roads, or in the use of the commonest precautions to insure safety, there will be no security for railway passengers. We must either eschew railway travelling altogether, or else understand, that in entering a railway carriage, we take our lives in our own hands. It would almost seem that the railway managers in our country have adopted some such theory of absolute immunity from all responsibility, or they would not dare expose their passengers to such awful perils. It is but just to say, that the barbarous and inhuman sacrifice of such multitudes as has occurred, in repeated instances, in our country during the last year, presents a problem which it is quite impossible for people in other countries to solve, and for which it is not easy for the most friendly disposed to invent any sufficient apology or excuse.

And when we reflect how these things are managed in England, by means of actual signals from station to station, showing a clear track before any train is allowed to pass ; and especially in some of the continental countries, like Austria and Bavaria, and other German States, and elsewhere, where electric telegraphic stations are maintained at very short intervals, with operators whose sole employment is to know that all is right on the advancing line, and to bow the trains along by the graceful touch of the hat as they pass ; when we pass along these lines, with double tracks throughout, and a perfect road-bed and superstructure and equipment, and all these telegraphic precautions in addition, we cannot but feel surprised that public opinion in America will tolerate

such terrible destruction of life, such horrid mangling of bodies and limbs, and literal burning alive, as has occurred there within the last few months. One feels the inexcusable character of these outrages more keenly while surrounded by those who are so incapable of comprehending how it is possible for them to occur. We hope the time is not very remote when our courts will be able to place themselves upon the proper theory on this subject, that any person, natural or corporate, who undertakes the transportation of passengers by the dangerous element of steam, and with the great speed of railway trains, must be held responsible for the use of every precaution which any known skill or experience has yet been able to devise, and that passengers are not bound to judge for themselves how many of these precautions it is safe to forego.

It is no excuse that the public desire cheap and rapid travelling in all directions and everywhere. We do not allow every one, at will, to build railways, and to manage them in his own way; and if the government professes to control these matters at all, it is bound to do it effectually. And if it were made a matter of national supervision, it would be much easier to do so, and thus prevent these daily tragedies, which we have almost ceased to regard in consequence of their frequency. We do not allow monomaniacs or brigands to commit suicide or murder at pleasure without interference, because it is their pleasure or their interest to do so; and we see no good reason why railway passengers, or railway managers, should be allowed to roast a hecatomb, in human sacrifice, because it seems convenient or desirable to the one or the other class concerned in the immolation, or because the one class demands and the other consents to use a mode of passenger transportation which inevitably produces these results.

The truth is, that common juries, with their higher instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation, in the light of higher and fuller responsibility than either the courts or the profession. It is not uncommon to hear it objected, in our country, against the wisdom or justice of jury trials, that the result is always the same in all actions for injuries to passengers on railways; the companies are sure to be cast in the actions. And this seems to be regarded as an unanswerable reproach. But when we reflect how much more might be done, in all such

cases, to secure perfect safety and exemption from injury ; and how much more really is done, both in Great Britain and on the continent of Europe, we can only conclude, that the common-sense interests of jurors have raised them to a higher plane of wisdom and justice than that which the courts, or the profession, have yet attained.

We do not feel prepared to say that a railway company who undertake the transportation of passengers, are absolutely bound to safe delivery, the same as common carriers of goods, inevitable accident, irresistible force and the misconduct of the party only excepted ; but we must confess, in all sincerity, that the distinction which we have all taken so much labor and pains to maintain, between these two classes of carriers, is rather shadowy and unsubstantial. And it seems to us that since the introduction of railways we are able to comprehend more fully, that the distinction is really without much just foundation. If no railway company is to be excused for any injury occurring to its passengers, until the company has done all that it was in its power to do to guard against the occurrence of injuries of that character, it will be a long time before we shall hear the repetition of the charge as a reproach, that juries always find against railway companies in such cases. They will be expected to find so. And for one we shall expect that all the excepted cases will soon be reduced to those which exist in the case of common carriers of goods. For if railway passenger carriers are bound to do all for the security of their passengers which human care, skill and diligence can effect, and if this is to be measured by what is known and done in like cases throughout the world, and the passenger is not presumed to exercise any judgment upon the subject, unless, or until he consents, in terms, expressly to assume some portion of the risk himself, or constructively does so by violating the regulations of the company, or by needlessly exposing his person, we do not see but the carrier must show, in order to excuse an injury to a passenger, that it resulted from inevitable accident or irresistible force, or was the fault of the passenger. If the carrier is bound to do all that it is possible to have done to prevent the occurrence of injury to his passengers, and really performs his duty, and injury still occurs, it must of necessity be an occurrence in the nature of things inevitable or irresistible. I. F. R.

LONDON, April 10, 1868.